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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

HOWARD FARMER,

Petitioner,

v.

ARABIAN AMERICAN OIL COMPANY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT.**

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WILLIAM V. HOMAN,

Of Counsel.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

Howard Farmer, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on November 6, 1963.

Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 59a) is reported at 31 F. R. D. 191. The opinions of the Court of Appeals (*infra* Appendix A, pp. A-1—A-23) (*Farmer v. Arabian American Oil Co.*, 324 F. 2d 359).

Jurisdiction.

The judgment of the Court of Appeals (Appendix B, pp. B-1 to B-2), was entered on November 6, 1963. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. §1254(1).

Questions Presented.

1. Whether Congress intended by its 1949 amendment to 28 U. S. C. §1821 to reject the 100 mile travel limitation rule for civil cases and create a different rule of costs in civil cases from that in admiralty and to abandon the traditional scheme of costs in American Courts which requires each party to pay his own litigation expenses.

2. Whether Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §1920 change the established rule forbidding appeals from decrees for costs alone when the power of the court to assess costs against either party is not in dispute and only the mere amount to be fixed is in issue.

3. Whether and to what extent a District Judge is bound to follow the views expressed by other judges on interlocutory or other rulings in exercising his discretion in determining the question of costs.

Statutes Involved.

The statutory provisions involved are 28 U. S. C. §1821, Rule 54(d) of the Federal Rules of Civil Procedure and 28 U. S. C. §1920. They are printed in Appendix C, *infra*, pp. C-1 to C-2.

Statement.

Petitioner, a medical doctor, instituted this action to recover \$4,000¹ damages for wrongful discharge in the Supreme Court, New York County. Respondent removed the cause to the United States District Court for the Southern District of New York on the ground of diversity of citizenship.

A trial before United States District Judge Palmieri and a jury resulted in a jury disagreement followed by a directed verdict of dismissal of petitioner's complaint, 176 F. Supp. 45 (1959) and the entry of a judgment for costs against petitioner in the sum of \$6,601.08.

On appeal to the United States Court of Appeals for the Second Circuit, that court reversed, 277 F. 2d 46, cert. denied, 364 U. S. 824 (1960).

Thereafter respondent sought and was granted an order directing petitioner to post security for costs in the sum of \$6,000. Upon petitioner's failure to comply with such order his action was dismissed. The Court of Appeals for the Second Circuit again reversed, 285 F. 2d 720 (1960) holding that the order constituted an abuse of discretion as it effectively precluded petitioner from prosecuting his action because of the expense of procuring the bond.

A second jury trial before United States District Judge Weinfeld resulted in a verdict for defendant. The clerk taxed costs of \$11,900.12 which were on petitioner's motion reduced by Judge Weinfeld, in the exercise of his discretion, to \$831.61.

On appeal by respondent on the sole issue of the amount of the costs to a panel of the United States Court of Appeals for the Second Circuit consisting of Chief Judge

¹ Later twice amended on respondent's demand to reflect estimated total damages.

Lumbard and Judges Smith and Hays, the active judges of that court on their own motion agreed that the appeal presents a question of importance in the administration of civil litigation, namely the power of a district judge to tax costs for the transportation of witnesses to trial from places without the judicial district and more than 100 miles distant from the place of trial, and that the appeal should be considered *en banc*.

The Court below divided on the question, Chief Judge Lumbard (with whom Judges Moore, Friendly, Kaufman and Marshall concur) refusing to follow what the late Judge Clark describes in his separate dissent as "a wise public policy buttressed by the overwhelming weight of authority and by long settled federal practice" because of the expressed belief (i) that the 100-mile limitation is an anachronism which Congress had not, by its 1949 amendment to 28 U. S. C. §1821, given any compelling evidence of an intention that it be continued; (ii) that the decisions of the other Courts of Appeals upholding the 100-mile rule were either decided prior to the 1949 amendment or, where decided thereafter, the "vast majority" do no more than cite other cases; and (iii) there is no reason to extend the practice of letting trial expenses fall on the party who incurs them beyond the cost of fees for legal services.

Judge Smith (with whom the late Judge Clark and Judge Hays concur) dissents and states that the majority decision not only is contrary to the overwhelming weight of authority and decisions of the other Courts of Appeals but that it creates a different rule for costs in civil cases from that in admiralty and, more important, it abandons the traditional scheme of costs in American courts to turn in the direction of the English practice of making the unsuccessful litigant pay his opponent's litigation expense as well as his own.

The late Judge Clark concurs in the dissent of Judge Smith and, in a separate opinion, reiterates the point that the weight of authority favors the traditional view upholding the 100 mile limitation and asserts that the majority decision represents an erroneous reading of the 1949 proviso to 28 U. S. C. §1821 and its legislative history.

Judge Waterman dissents in a separate statement from the result reached by the majority. He would affirm the judgment on appeal and would retain the 100-mile limitation to be imposed in the first instance but he would not take away from a district judge the power to disregard the limitation in the rare case where its automatic application "can work scandalous injustice."

Reasons for Granting the Writ.

1. The decision of the court below departs from a traditional and long established practice which will have revolutionary consequences in civil cases.

The decision is directly in conflict with the decisions of other courts of appeals. *Kemart Corp. v. Printing Arts Research Laboratories, Inc.*, 232 F. 2d 879 (9 Cir. 1956); *Spiritwood Grain Co. v. Northern Pac. Ry.*, 179 F. 2d 338 (8 Cir. 1950) (dictum); *Friedman v. Washburn Co.*, 155 F. 2d 959 (7 Cir. 1946); *Vincennes Steel Corp. v. Miller*, 94 F. 2d 347 (5 Cir. 1948).

This conflict, as well as the importance of the question involved, is recognized and adverted to by the five majority judges and the three judges in the minority who joined in the dissenting opinion.

Moreover, this decision, if not reversed, will lead to a different rule for costs in civil cases from that prescribed by this court for admiralty cases.

This square and irreconcilable conflict which is of general importance in the administration of Civil Law and is certain to have continuing future consequences can be effectively resolved only by the prompt action of this court.

2. The decision of the court below is directly in conflict with the decisions of this court in *Newton v. Consolidated Gas Co.*, 265 U. S. 78 (1924) and earlier decisions of the same court (*The James McWilliams*, 49 F. 2d 1026 (1931) and of the Ninth Circuit Court of Appeals (*Walker v. Lee*, 71 F. 2d 622), Seventh Circuit (*W. F. & John Barnes Co. v. International Harvester Co.*, 145 F. 2d 915, cert. den., 324 U. S. 850) and Fifth Circuit (*McWilliams Dredging Co. et al. v. Department of Highways of Louisiana*, 187 F. 2d 61), holding that an appeal relating solely to costs, where the question at issue is one going to the discretionary power to allow costs as distinguished from the power of the trial costs to allow or disallow such costs, will not lie.

In the case at bar the trial court's discretion in disallowing and reducing certain items of costs was the sole controverted question presented to the court below.

The court below not only entertained the appeal in disregard of the established rule which prohibits appeals involving only costs, but substituted its discretion for that of the district judge who was uniquely qualified to exercise its discretion according to the justice of this particular case, by reason of personal knowledge acquired at trial and the expression of the Court of Appeals' views expressed after two appeals, one involving a full review of all the facts of this case and one involving the very issue of costs submitted to the trial court for determination.²

² *Farmer v. Arabian American Oil Company*, 277 F. 2d 46 and 285 F. 2d 720

3. Other important questions which appear not to have been settled which are of great and recurring significance in the administration of civil law are presented. Whether and to what extent a trial judge is bound to defer to the opinions of other judges expressed on the taxation of costs after prior determinations later reversed is one of these. Another is whether a party's election to bring witnesses from afar despite the availability of depositions or interrogatory process automatically entitles him to tax such travel costs without limitation against his unsuccessful adversary. Still another question is whether we are prepared to abandon the traditional American system of costs in favor of the English system never accepted by us because as the late Judge Clark said in his separate dissenting opinion, it favored the rich and unduly penalized the poor.

The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon the historic policy designed to keep our courts open to the rich and poor alike make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York City, February 3, 1964

Respectfully submitted,

KALMAN I. NULMAN,
Counsel for Petitioner.

KALMAN I. NULMAN,
WILLIAM V. HOMANS,
Of Counsel.

APPENDIX A.

Opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 240—October Term, 1962.

(Argued February 1, 1963

Submitted to the *in banc* court March 18, 1963

Decided November 6, 1963.)

Docket No. 27893

HOWARD FARMER,

Plaintiff-Appellee,

—v.—

ARABIAN AMERICAN OIL COMPANY,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*, CLARK, WATERMAN, MOORE,

FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL,

Circuit Judges.

Appeal by defendant from taxation of costs in its favor in civil action in the United States District Court for the Southern District of New York, Edward Weinfeld, J., 31 F. R. D. 191. Affirmed in part and reversed in part.

KALMAN I. NULMAN, New York, N. Y. (WILLIAM V. HOMANS, New York, N. Y., on the brief),
for plaintiff-appellee.

CHESTER BORDEAU, New York, N. Y. (WHITE & CASE and WILLIAM D. CONWELL, New York, N. Y., on the brief), *for defendant-appellant*.

LUMBARD, *Chief Judge* (with whom Judges MOORE, FRIENDLY, KAUFMAN and MARSHALL concur):

This appeal presents a question of importance in the administration of civil litigation, namely the power of a district judge to tax costs for the transportation of witnesses to trial from places without the judicial district and more than 100 miles distant from the place of trial. We hold that costs for such travel may be allowed and in the light of that holding we examine the rulings with respect thereto made by the district judges at the two trials of Farmer's suit for an alleged breach of his contract of employment.

Howard Farmer instituted this litigation on May 24, 1956, in the Supreme Court, New York County, against the Arabian American Oil Company (Aramco). Aramco removed the cause to the United States District Court for the Southern District of New York, there being diversity of citizenship. A trial was had before Judge Palmieri and a jury, which terminated in a jury disagreement. Thereafter, Aramco's motion for a directed verdict was granted, 176 F. Supp. 45 (1959), but this determination we reversed, 277 F. 2d 46, cert. denied, 364 U. S. 824 (1960), necessitating a second trial. Farmer failed to comply with an order directing him to post security for costs, and the action was dismissed. We again reversed, holding that the order constituted an abuse of discretion, as it effectively precluded the plaintiff from prosecuting his action because of the expense of procuring the bond, 285 F. 2d 720 (1960). A second jury trial, before Judge Weinfeld, resulted in a verdict for the defendant. The Clerk taxed costs of \$11,900.12 which on Farmer's motion were reduced by Judge

Weinfeld to \$831.60, and from this order Aramco appeals. After the appeal was heard by a panel consisting of Judges Lumbard, Smith and Hays, the active judges of this court agreed that the appeal should be considered *in banc*.

Some earlier decisions cast doubt on the appealability of a judgment solely for costs. See *Newton v. Consolidated Gas Co.*, 265 U. S. 78 (1924); *The James McWilliams*, 49 F. 2d 1026 (2 Cir. 1931); *Walker v. Lee*, 71 F. 2d 622 (9 Cir. 1934). However, Rule 54(d) of the Federal Rules of Civil Procedure now governs the granting of costs. It states: "Except when an express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs * * *". The effect of this provision, combined with 28 U. S. C. §1920,¹ is to make the right to statutory costs subject to judicial discretion. Within the careful statutory scheme, no hint of intent to create an element of uncontrolled discretion can be found, nor is one lightly to be implied. Furthermore, it is unquestionably true that the portion of the judgment relating to costs may be reviewed on appeal, for abuse of that discretion, if other issues are also raised. See, e.g., *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.*, 207 F. 2d 67 (2 Cir. 1953), 347 U. S. 904 (1954); *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1 (7 Cir. 1949), cert. denied, 338 U. S. 948 (1950). We see no reason why we should not hear an appeal from this element alone. It is surely a final judgment within the meaning of 28 U. S. C. §1291. See *Donovan v. Jeffcott*, 147 F. 2d 198 (9 Cir. 1945). We hold that when, as here, the question is not whether the district

¹ Section 1920 provides:

"A judge or clerk of any court of the United States may tax as costs the following:

(3). Fees and disbursements for printing and witnesses."

judge should have allowed or disallowed particular items of costs, but is rather whether he exceeded, and therefore abused, his discretion, a judgment solely for costs is appealable. *Lichter Foundation, Inc. v. Welch*, 269 F. 2d 142 (6 Cir. 1959); *Kemart Corp. v. Printing Arts Research Laboratories*, 232 F. 2d 897 (9 Cir. 1956); *Prudence-Bonds Corp. v. Prudence Realization Corp.*, 174 F. 2d 288 (2 Cir. 1949); *Harris v. Twentieth Century-Fox Film Corp.*, 139 F. 2d 571 (2 Cir. 1943); 6 Moore, Federal Practice 1309 (1953).

In taxing costs, the Clerk included substantial amounts for air transportation of defendant's witnesses from as far away as Saudi Arabia to the place of trial. Judge Weinfeld reduced these assessments to a uniform allowance of \$16.00 per witness, or the equivalent of 100 miles each way at \$.08 per mile. Judge Weinfeld took this action as an exercise of judicial discretion, choosing not to rely upon the 100-mile limitation frequently imposed by the federal courts on their own power to assess transportation costs of witnesses brought from without the judicial district in which the trial court is sitting. We must therefore first determine the applicability of the 100-mile limitation. We hold the 100-mile rule inapplicable as a restraint upon the exercise of judicial discretion in the assessment of transportation costs for witnesses brought to trial.

The 100-mile rule appears to have evolved out of the limitation upon the subpoena power of a federal court to an area within the judicial district or 100 miles from the place of trial. See Federal Rules of Civil Procedure 45(e). There is not a shadow of a suggestion, however, in 28 U. S. C. §1920(3), which provides simply that "fees and disbursements for . . . witnesses" may be taxed as costs, that the court's power to issue a subpoena has anything whatever to do with what constitutes a recoverable disbursement for a witness. Indeed, 28 U. S. C. §1821 as amended in 1949

provides clear authorization for the taxation of the actual expenses of travel for witnesses who come from afar. Section 1821 expressly provides that *in lieu of* the usual mileage allowance, actual travel expenses shall be allowed to witnesses who are required to travel between "the Territories and possessions, or to and from the continental United States." The great bulk of judicial authority supporting the 100-mile rule is to be found in cases decided prior to the enactment of the 1949 amendment which added the above-quoted provision. *Friedman v. Washburn Co.*, 155 F. 2d 959 (7 Cir. 1946); *Vincennes Steel Corp. v. Miller*, 94 F. 2d 347 (5 Cir. 1938). The vast majority of the more recent cases which approve the rule do no more than cite other cases, without considering the reasons which might lend support to it or weigh against it. Those cases decided subsequent to the 1949 legislation give it little or no attention. E.g., *Ludvigsen v. Commercial Stevedoring Co., Inc.*, 228 F. 2d 707 (2 Cir.) (dictum), cert. denied, 350 U. S. 1014 (1956); *Kemart Corp. v. Printing Arts Research Laboratories, Inc.*, 232 F. 2d 897 (9 Cir. 1956); *Perlman v. Feldmann*, 116 F. Supp. 102 (D. Conn. 1953), reversed on other grounds, 219 F. 2d 173 (2 Cir.), cert. denied, 349 U. S. 952 (1955). Moreover, in some recent cases in the lower courts the 100-mile rule has been flatly rejected. *Bennett Chemical Co. v. Atlantic Commodities, Ltd.*, 24 F. R. D. 200 (S. D. N. Y. 1959); *Maresco v. Flota Mercante Grancolombiana, S.A.*, 167 F. Supp. 845 (E. D. N. Y. 1958); *Bank of America v. Loew's International Corp.*, 163 F. Supp. 924 (S. D. N. Y. 1958).

Whatever the merits of the prior judicial rule, the Congress has not given any compelling evidence demonstrating an intention that it be continued. The reason for the addition of an express provision for actual travel expenses in the case of overseas travel is stated in the letter of the Assistant to the Attorney General, appended to and made

part of the report of the Senate Committee discussing the 1949 bill: "For overseas travel, it is recommended that witnesses be allowed their actual expenses at the lowest first-class rate available. There have been times when witnesses have been required to engage in such travel at a personal financial sacrifice." S. Rep. No. 187, 81st Cong. 1st Sess., reprinted in 1949 U. S. Code Cong. Serv. 1231, 1233.

The 100-mile rule finds as little support in reason as it does in the statutes. Whether a witness comes into court voluntarily or under the compulsion of a subpoena, he comes at the behest of the party for whom he appears as a witness. Either way, he serves the interest of the court in arriving at a just determination of the controversy. See *United States v. Sanborn*, 28 Fed. 299 (C. C. D. Mass. 1886) (opinion by Mr. Justice Gray). The fact that a subpoena does not issue because the witness is outside the reach of the court has nothing to do with the problem of how to allocate the cost of his appearance at the trial.

Nor can the 100-mile rule be defended as an allocation of the expenses of litigation in keeping with the practice of our courts to let such expenses fall on the party who incurs them. Fees for legal services are usually the largest single expense of litigation. In most cases, the prevailing party must pay such fees himself, even if he has come into court only to defend against an unjust accusation. There is no reason to extend this practice further. Certainly there is no reason to extend it by the curious means of limiting the recovery of travel expenses to 100 miles, a figure which may bear no relation to the distance actually traveled. As this case well illustrates, a 100-mile limitation is an anachronism in a day when the facility of world-wide travel and the development of international business make the attendance at trial of witnesses from far off places almost a matter of course.

It has been suggested that the 100-mile rule serves a salutary purpose insofar as it erects some protection for the impecunious litigant who might otherwise hesitate to institute litigation in the fear that, if unsuccessful, he may bear the burden of transporting the defendant's witnesses. It seems plain, however, that any such solicitude for the rule is ill-founded. There may be cases in which the fair administration of justice requires that the losing party not be taxed to the full extent of the cost of producing witnesses for the other party. But it surely cannot be said that there will never be a case in which the losing party, in the interest of justice, should bear such costs. For example, had the positions in this case been reversed and Farmer been forced to produce witnesses from Saudi Arabia in order to defend against unjust charges of Aramco, one could hardly assert the justice of requiring Farmer to pay the costs of producing his witnesses himself, or risk the failure of his defense. Indeed, adherence to a rigid limitation on the taxation of travel expenses is more likely to work to the detriment of litigants with meager financial resources than a rule which leaves the allocation of costs to be determined according to the circumstances of each case.

There is no reason why a judge should be thought less capable of determining a proper allocation of the costs of witnesses' travel expenses than he is of allocating other expenses of trial, such as transcripts, which are committed without artificial limitation to the discretion of the trial judge. We do not hold that the full measure of travel expenses *must* be taxed against the unsuccessful party in each and every cause; we merely affirm the *power* of a federal district judge to exercise his discretion in the allocation of such costs. In exercising that discretion, the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful

litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith. It is only under such a rule that the impecunious litigant may be assured of his right to present effectively his case to judge and jury.

Concluding that the 100-mile rule is inapplicable, we turn to the particular items of costs taxed in the case at bar. At the first trial, Judge Palmieri allowed travel expenses totalling \$3,715.21 for transportation of six witnesses, three of whom came from Saudi Arabia. For reasons stated below, we think that, except as to the travel expenses of witnesses Page and Swanson, totalling \$2,064.00, it was within the discretion of Judge Palmieri to allow these expenses, and that his exercise of discretion should not have been disturbed. As the judge who presided at the first trial, Judge Palmieri had the greater opportunity to assess the necessity of particular costs incurred in defense of the action before him. This circumstance, considered in the light of the sensitive nature of the problems presented when one district judge is asked to pass upon the exercise of discretion by another, makes it inappropriate for a district judge to undertake an independent determination *de novo* of the costs allowed at a prior trial.

The plaintiff alleged that he had been hired to work as an ophthalmologist at the defendant's hospital in Saudi Arabia, and that he had been wrongfully discharged. In addition to disputing the terms of the employment contract, the defendant contended that the plaintiff had been discharged for just cause, specifically that he had performed an operation without first obtaining the results of certain tests, in violation of an express rule of the hospital and accepted standards of medical practice. The plaintiff's explanation for his discharge was that he had insisted upon truthfully reporting alleged findings that many American employees of the defendant in Saudi Arabia were contract-

ing trachoma, a tropical disease which leads to blindness. He claimed that his superiors had sought to intimidate him into suppressing his findings.

The witnesses, whose travel expenses are in dispute gave evidence relating to the conflicting accounts of the plaintiff's discharge. There is no question that these witnesses had information which was essential to disprove the plaintiff's claims and establish the defense. Judge Weinfeld determined, however, that in view of the heavy expense of producing them in court, the defendant should have relied on written testimony taken in advance of trial or, at least, should itself bear the cost of the witnesses' appearance at trial. We cannot agree.

It is difficult to imagine a more serious charge against an employer than that he suppressed evidence that employees ran the risk of contracting a serious disease. In such circumstances, the defendant could not possibly have been expected to adopt less than the most effective means of disproving the plaintiff's charges. We have had occasion in the past to note the importance of "live" witnesses in a trial before a jury. See *Arnstein v. Porter*, 154 F. 2d 464, 469-70 (1946). Moreover, in the first instance it is for the judge before whom the trial is had to gauge the necessity for transporting witnesses to the place of trial and to determine the propriety of assessing costs for such transportation against the unsuccessful litigant. We believe Judge Weinfeld should have deferred to Judge Palmieri with respect to those costs incurred in the first trial before him, just as we defer to him with respect to the costs of the trial at which he presided.

It appears, however, that two of the witnesses, Page and Swanson, occupied otherwise empty space in company planes on regularly scheduled flights to and from Saudi Arabia, so that as to them there was no actual travel expense incurred by the company and none should have been allowed.

Judge Palmieri allowed costs of \$361.55 for transcripts of pretrial hearings, examinations before trial, and depositions. Judge Weinfeld reduced this amount to \$76.05. Considering the importance of pretrial hearings and the discovery procedure under the Federal Rules, we cannot say that it was an abuse of discretion for Judge Palmieri to conclude that these costs were necessary elements of preparation for the first trial, and then to allow them. Similarly, we find it within Judge Palmieri's discretion to allow \$1,812.30 for stenographer's fees incurred in compilation of the daily minutes of trial, as well as \$180.02 for photostatic copies of certain bulky exhibits, as he found both of these items necessary to the proper conduct of the trial. See 28 U. S. C. §§1920(2), 1920(4). We hold that it was an abuse of discretion in view of Judge Palmieri's findings as to their necessity, for Judge Weinfeld to disallow them.

We sustain in its entirety Judge Weinfeld's determination as to the costs incurred in the trial held before him. Although there are those of us who would have allowed traveling expenses beyond the 100-mile limit had the trial been before us, we cannot say that Judge Weinfeld abused his discretion in limiting costs for transportation of witnesses to the second trial, held before him, to a uniform allowance of \$16.00 per witness.

We therefore reverse and remand with instructions to allow the costs as taxed by Judge Palmieri on the first trial, \$6,601.08, less \$2,064.00 taxed for the travel of Page and Swanson, or a total of \$4,537.08 for the first trial, plus those items taxed by Judge Weinfeld on the second trial.

SMITH, *Circuit Judge* (with whom CLARK and HAYS, *Circuit Judges*, join) dissenting:

I dissent, both from the determination that Judge Weinfeld abused his discretion in fixing costs and from the

holding that he had discretion to tax costs for travel over the "100-mile limit." As a matter of judgment the judge taxing costs might have made larger allowances for photostats and transcript on both trials, because of the seriousness of the charges and the importance of the outcome to the parties. But the issues were not extraordinarily complicated, nor the trial one of great length, the judge had the benefit of observation of the proceedings directly before him, and I would not hold the judge's decision that much of the expense was not really necessary, error or his limitation of costs so flagrant an error as to constitute an abuse of discretion.

More important, however, to future litigants is the rejection of the limitation almost universally observed in the federal courts heretofore, of the taxation of travel expenses as costs where the travel is from a point without the district and more than 100 miles distant. This decision not only breaks with the overwhelming weight of authority, and creates a different rule for costs in civil cases from that in admiralty, but also, as the majority indeed appears to admit, abandons the traditional scheme of costs in American courts to turn in the direction of the English practice of making the unsuccessful litigant pay his opponent's litigation expense as well as his own. It has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means. Of course there are arguments for the English system, in its discouragement of much litigation, but it is strange to find this court taking this time and opportunity to espouse it in the face of the contrary choice of the Supreme Court when the identical question of taxation of travel expense was before it in the formulation of the Admiralty Rules. I fear that the majority reads into the statute and rule

concerning reimbursement of witnesses and costs a direction as to where the ultimate burden of litigation expense must fall which just isn't there.

In reducing the allowance to the equivalent of mileage for 100 miles each way at 8¢ a mile, Judge Weinfeld did not rely on the limitation referred to which has heretofore been imposed by the courts on the power to assess mileage outside the district and more than 100 miles, but rather took the action as an exercise of discretion. We should consider, however, whether his ruling should be affirmed on the basis of the 100-mile limitation. I would hold that it should be so affirmed. Even though it is now accepted that a witness need not be under subpoena to collect his statutory fees and make the losing party liable for them as costs, it will be noted that most courts that have considered the question have imported the territorial limitation on the subpoena of witnesses² (within the district or 100 miles from the place of trial) to limit the distance for which mileage fees can be taxed as costs. *Ludvigsen v. Commercial Stevedoring Co., Inc.*, 228 F. 2d 707 (2 Cir.) (dictum); cert. denied 350 U. S. 1014 (1956); *Kemart Corp. v. Printing Arts Research Laboratories, Inc.*, 232 F. 2d 897 (9 Cir. 1956); *Spiritwood Grain Co. v. Northern Pac. Ry.*,

² Rule 45(e) of the Federal Rules of Civil Procedure.

(e) Subpoena for a Hearing or Trial.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C. §1783.

179 F. 2d 338 (8 Cir. 1950) (dictum); *Friedman v. Washburn Co.*, 155 F. 2d 959 (7 Cir. 1946); *Vincennes Steel Corp. v. Miller*, 94 F. 2d 347 (5 Cir. 1948); *Perlman v. Feldmann*, 116 F. Supp. 102 (D. Conn. 1953), reversed on other grounds, 219 F. 2d 173 (2 Cir.), cert. denied 349 U. S. 942 (1955); *Kenyon v. Automatic Instrument Co.*, 10 F. R. D. 248 (W. D. Mich. 1950); *Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp.*, 11 F. R. D. 259 (W. D. Mo. 1951); modified on another ground, 194 F. 2d 846 (8 Cir.), cert. denied 343 U. S. 942 (1952); *Barnhart v. Jones*, 9 F. R. D. 423 (S. D. W. Va. 1949); *Gallagher v. Union Pac. Ry.*, 7 F. R. D. 208 (S. D. N. Y. 1947); *Anonymous*, 1 Fed. Cas. 992 (C. C. S. D. N. Y. 1863); *Beckwith v. Easton*, 3 Fed. Cas. 29 (D. C. E. D. N. Y. 1870); *The Leo*, 15 Fed. Cas. 326 (D. C. E. D. N. Y. 1872); *Buffalo Ins. Co. v. Providence & Stonington S.S. Co.*, 29 Fed. 237 (C. C. S. D. N. Y. 1886); *The Vernon*, 36 Fed. 113 (D. C. E. D. Mich. 1888); *The Syracuse*, 36 Fed. 830 (C. C. S. D. N. Y. 1888); *Kirby v. United States*, 273 Fed. 391 (9 Cir. 1921), aff'd 260 U. S. 423. (The affirmance does not mention the problem); *Consolidated Fisheries v. Fairbanks, Morse & Co.*, 106 F. Supp. 714 (E. D. Pa. 1952); *Lee v. Pennsylvania R.R. Co.*, 93 F. Supp. 309 (E. D. Pa. 1952); *Commerce Oil Refining Co. v. Miner*, 198 F. Supp. 895 (D. R. I. 1961); *Reynolds Metals Co. v. Yturvide*, 258 F. 2d 321 (9 Cir. 1958), cert. denied 358 U. S. 840. Besides this authority, Moore approves the rule, although without discussion or analysis. 6 Moore, Federal Practice, pp. 1362-63. Contra, *Bennett Chemical Co. v. Atlantic Commodities, Ltd.*, 24 F. R. D. 200 (S. D. N. Y. 1959); *Maresco v. Flota Mercante Grancolombiana, S.A.*, 167 F. Supp. 845 (E. D. N. Y. 1958); *Bank of America v. Loew's International Corp.*, 163 F. Supp. 924 (S. D. N. Y. 1958); *Knox v. Anderson*, 163 F. Supp. 822 (D. Hawaii 1958). Besides *United States v. Sanborn*, 28 Fed. 299 (C. C. D. Mass. 1886) (Gray, J.) which

rejects the 100 mile rule, there is other authority to the same effect from Massachusetts. See *Prouty v. Draper*, 20 Fed. Cas. 13 (C. C. D. Mass. 1842) (Story, J.). The First Circuit, however, cannot really be taken as having this position today. *The Governor Ames*, 187 Fed. 40, 50 (1 Cir. 1910) states the rule which had been followed in the District of Massachusetts but criticizes it. The District Court in *Commerce Oil Co. v. Miner, supra*, felt itself not bound by the old cases and went on to follow the great weight of authority.³

The sole remaining support for the rejection of the 100-mile limitation, therefore, would seem to be the District Court cases in the Southern and Eastern Districts of New York, and the single case from the District of Hawaii. With all deference, I feel that the rejection of the rule advocated by these few cases and carried out by our brethren in this case is based on an erroneous reading of the proviso added in 1949 to 28 U. S. C. §1821. The legislative history of the proviso, 1949 U. S. Code Cong. Service, pp. 1231-3, discloses only a concern for the inadequacy of compensation to witnesses, as to rate per diem and mileage, and inadequacy in cases where mileage was below first class fare, with no discussion whatever by the Committee or the Assistant to the Attorney General of the eventual recovery

³ From opinion by Judge Day, 198 F. Supp. 895, 899:

"In the absence of any authoritative holding by the Court of Appeals for the First Circuit, I am constrained to follow the reasoning and logic of the rule prevailing in the majority of the federal courts. This rule imposes no undue hardships on a litigant, in view of the liberal provisions of Rule 26 of the Federal Rules of Civil Procedure for the taking of the depositions of persons living outside the district where a case is pending, and for their use at the trial of such case. In the event a litigant feels that the testimony of a witness in person is essential, it is only right and proper that such litigant should bear the excess in cost incident to his personal appearance before the trial court. Accordingly, the allowance for mileage for witnesses residing outside this district shall be limited to 100 miles each way."

of the fees as costs by the prevailing party. It was necessary to obtain authority to pay the expenses of such witnesses at the lowest first class rate so that their attendance could be obtained without financial sacrifice on their part. It is noteworthy that the request came from the Department of Justice and not from the Administrative Office, and that it applies to witnesses in criminal as well as civil and admiralty causes. It is impossible to tell from the language of the statute itself whether the 100-mile rule was within the contemplation of the Congress at the time. Yet some indication of a lack of any purpose to affect the rule may be drawn from the title of the Act which added the proviso, "An Act to increase the fees of witnesses in the United States Courts and before United States Commissioners, and for other purposes" with no mention of any effect on taxable costs. It is hard to believe that the Assistant to the Attorney General was unfamiliar with the 100-mile rule in the light of the volume of government civil and admiralty litigation. This is particularly so in the light of the existence of Admiralty Rule 47,¹ by which the Supreme Court, as early as 1920, recognized and enforced the 100-mile rule. The Supreme Court's power over costs in admiralty was confirmed in the 1948 revision of Title 28, §1925, without any reference to Rule 47. It seems quite anomalous to argue that the Congress which in 1948 confirmed the power of the Supreme Court over costs in admiralty in the face of existing Rule 47 applying the 100-mile travel costs limit, indirectly rejected it a year later by a statute not limited to civil cases.

In the interest of precise statement, I would adopt the formulation of the Ninth Circuit: "Mileage allowable

¹ Admiralty Rule 47. Costs—travel of witnesses

Traveling expenses of any witness for more than one hundred miles to and from the court or place of taking the testimony shall not be taxed as costs.

should be that which was traveled *within* the district, or actual mileage traveled in and out of the district up to 100 miles, whichever is the greater." *Kemart Corp. v. Printing Arts Research Laboratories, Inc.*, *supra* at 904 (emphasis in original). The point is of more than formal interest in a circuit whose districts include some with distances of more than 100 miles from a seat of court. See *Hayden v. Chalfant Press, Inc.*, 281 F. 2d 543 (9 Cir. 1960).

Imposition of this limitation on costs is more in keeping with a fundamental choice in our legal system than allowing an unlimited reimbursement would be. Unlike some other countries we have always left the major portion of the expense of litigation to fall ultimately upon the party who bears it in the first instance. Recovery of attorney's fees and major expenses of preparation for trial is with us the exception rather than the rule. If perhaps, the victor in a just cause is not made entirely whole, the doors of our courts are not closed to the small litigant who cannot risk being ruined by the imposition of his adversary's full expenses. The witness, of course, still recovers his full statutory fees under 28 U. S. C. §1821. The effect of the existing rule is to divide this burden between the party summoning him and the party liable for the statutory costs, with the party who chooses to summon him bearing the larger portion of the costs when extensive travel is chosen in place of testimony by deposition or letters rogatory. I submit that this result will best promote the fair administration of justice in the district courts.⁵

⁵ Judge Moore's language in *Barnhart v. Jones*, *supra*, is quoted:

"... The effect of a subpoena served outside the district is limited to 100 miles from the place of trial, and it seems only reasonable to infer that Congress must have intended to limit the taxation of mileage to the same distance. If a court in a country as vast as ours permitted taxation of the entire mileage of witnesses without limitation as to distance, an unbearable burden would be imposed upon the conduct of litigation. Such a course might in some cases lead to a result whereby costs be greater than the amount of the recovery.

Judge Weinfeld was therefore correct in result in limiting the travel expense allowed as costs to each witness from without the district to \$16.00—8¢ a mile for 100 miles each way for each trial.

Turning now to his rulings on other items we must determine whether there was an abuse of discretion in his disallowance of any of those taxed by the Clerk. At the outset we are faced with the fact that the judgment after the jury disagreement on the first trial was vacated by the reversal on appeal, so that Judge Palmieri's findings as to the necessity and reasonableness of such items as transcript and photostatic copies of portions of exhibits for use at the trial were not binding on Judge Weinfeld in reviewing costs at the time of final judgment. These are matters in which, however, it would seem that great deference should be given by the second judge to the opportunity of the first judge, here Judge Palmieri, to weigh the situation then before him in assessing necessity. The second judge does, however, have an advantage of the additional developments before him subsequent to the first trial, which he may take into consideration. In the light of this, although the writer would as an original matter have been inclined to make the allowance made by Judge Palmieri, at least as to the necessity of photostats⁶ and transcripts of pre-trial depositions and perhaps also as to the necessity of daily transcript,⁷ there is surely ground for difference of

"Economy in litigation is an essential element of justice. Taxation of unlimited mileage allowances is in derogation of this principle, and cannot be permitted."

⁶ Compare *Galion Iron Works & Mfg. Co. v. Beckwith Machinery Co.*, 25 F. Supp. 591 (W. D. Pa. 1938) with *Raffold Process Corp. v. Castanca Paper Co.*, 25 F. Supp. 593 (W. D. Pa. 1938).

⁷ See *Bank of America v. Loew's International Corp.*, *supra*; *Perlman v. Feldmann*, *supra*.

opinion as to the necessity of photostats and transcript, let alone daily copy, in a trial of these rather simple, though hard fought, issues. It was therefore not an abuse of discretion to disallow the items, and as pointed out by the majority, our review of these items is not to determine whether the findings of Judge Weinfeld as to necessity and reasonableness are correct, but whether they are so grossly in error as to constitute an abuse of judicial discretion.

I would affirm the judgment for costs of \$831.60.

CLARK, *Circuit Judge* (concurring in the dissent of Judge SMITH):

I concur completely in Judge SMITH's dissent, expressing, as it does, a wise public policy, buttressed by the overwhelming weight of authority and by long settled federal practice. But I venture a brief additional statement because of the great practical importance of the issue and because the ambiguities and policy conflicts of the majority opinion will require a re-evaluation of the problem either judicially or by rule-makers or legislators. The problem may be made concrete by considering the difficulties hereafter facing district court clerks and judges. Up to now—as shown by inquiry, as well as by the long list of precedents—the clerks have applied the 100-mile limitation on travel of witnesses routinely and substantially without dispute. Now they are faced with two opposing policy approaches and will not be able to act when the issue arises without a full-dress hearing and a court review.

In its attempt to straddle the division of policy disclosed below, the majority decision has all the earmarks of a compromise result. There is nothing inherently wrong in this; at times a compromise among views may be quite desirable. But care must be taken that it does not lead to illogical or conflicting results. Here in practical consequence we

have lavish travel fees allowed on the round of litigation which the defendant lost, and denied on the round it won. The difficulty arises because the decision departs from the wise normal rule that one judge alone is responsible for the ultimate decision of a cause on trial and that this responsibility is not to be shared with or apportioned among those who have made preliminary or interlocutory rulings. As a matter of fact the decision does great injustice to the first judge here, because it holds him to rulings made at a preliminary stage, before much that is relevant had happened, and does not give him an opportunity to review and revise his actions in the light of later events. I regard the responsibility as centered in Judge Weinfeld; but if, contrary to this, we force him to divide it with Judge Palmieri, we should at least have given the latter the opportunity to review his holdings in the light of the full record.

Again it appears that the majority have lacked final courage to reach a completely hard-boiled result; as of course is shown by their reduction of the quite outrageous sum claimed of \$11,900.12 (composed mainly of the cost of defendant's bringing its own employees around the world) to \$4,537.08, plus the cost allowed of the second trial, apparently \$335.55. This sum, totaling nearly \$5,000, is not an inconsiderable item; but ironically that required some questionable rulings to reach it. Thus the expenses of witnesses Page and Swanson, totaling \$2,064, were disallowed because they occupied otherwise unused space on a company plane. Except on the theory that two wrongs make a right, this cannot be justified, for it is settled on the authorities that costs for witnesses legally due are taxable, whether they have been paid to the witness or not. The taxing authority cannot be expected to go into the issue whether the witness may not have appeared voluntarily, making no claim for fees.

There are other factors which, to me, point also to the injustice of the result. At an early stage of the case, we very pointedly criticized lavish travel expenditures in reversing an order for a bond for costs which plaintiff was unable to furnish. *Farmer v. Arabian American Oil Co.*, 2 Cir., 285 F. 2d 720. When the defendant persisted, it would seem that the extra expenditures should have been at its own risk and from its own treasury. The majority are surely ill-advised in trying to claim support from the supposed equities; at best shifting sands, here these obviously favor the plaintiff as much as the defendant.¹ Nor is the supposed need of oral testimony an adequate excuse; the jury, in my judgment, is not so stupid as to need to see the defendant's employees in person to decide where the truth lies. And in the federal system we have provided ample means of securing testimony through depositions and interrogatories, making it reasonable, natural, and practical to limit repayment of travel costs to those only who can be required to come to court by exercise of the court's subpoena power. Indeed, heretofore we have taken the position that a party's preference for oral testimony must be weighed against the burden to his opponent, and an order for depositions or interrogatories must be substituted when travel costs will be burdensome. *Hyam v. American Export Lines*, 2 Cir., 213 F. 2d 221, 222-223 (per Harlan, J.); *Richmond v. Brooks*, 2 Cir., 227 F. 2d 490, 492. Nor is the claim at all realistic that these large allowances may at times favor the impecunious litigant. Such a liti-

¹Thus the defendant's defense of its discharge of the plaintiff was an attack on the latter's professional competence, calling forth as bitter emotions as did the plaintiff's attack on defendant's hospital conditions. And there seems to have been a great deal of evidence not closely relevant involving plaintiff's marital, litigious, and emotional instability. It should be recalled that it took two juries to settle the plaintiff's fate; the first jury disagreed.

gant will not have the cash to advance originally; nor can he take the chance of being saddled with the cost ultimately. As Judge SMITH so well demonstrates, this argument represents an approach to the English system, never accepted by us because of our conviction that it "favored the wealthy and unduly penalized the losing party."² Here the bill of costs, obviously ruinous to a plaintiff who could not afford a cost bond, can mean little more than an instrument of revenge to this great corporation. I submit that it is not wise policy, or consistent with our traditions, to put the decision of the lavishness of the trial for all practical purposes in the hands of the winning litigant.

Judge SMITH gives a fair indication of the strength of the precedents for this traditional view, including the Supreme Court's Admiralty Rule 47, although he does not exhaust the available number.³ With the recent cases repudiating the few earlier cases contra in the First Circuit, see *Commerce Oil Refining Corp. v. Miner*, D. C. R. I., 198 F. Supp. 895, the majority decision is supported only by certain district court decisions here which do not represent the law of our Circuit.⁴ And neither statute nor rule

² *Conte v. Flota Mercante del Estado*, 2 Cir., 277 F. 2d 664, 672, per Friendly, J., citing Goodhart, *Costs*, 38 Yale L. J. 849, 872-877 (1929).

³ See, e.g., Annotation ¶ to 28 U. S. C. §1821.

⁴ *Bank of America v. Loew's International Corp.*, D. C. S. D. N. Y., 163 F. Supp. 924, per Dawson, J.; *Bennett Chemical Co. v. Atlantic Commodities, Ltd.*, D. C. S. D. N. Y., 24 F. R. D. 200, per Dawson, J.; *Maresco v. Flota Mercante Grancolombiana, S.A.*, D. C. E. D. N. Y., 167 F. Supp. 845, per Byers, J. The case of *Knor v. Anderson*, D. C. Hawaii, 163 F. Supp. 822, rests on a special statutory provision. See note 6 *infra*. Against these may be cited such important Second Circuit cases as *Perlman v. Feldmann*, D. C. Conn., 116 F. Supp. 102, 115, per Hincks, J.; *Gallagher v. Union Pac. R. Co.*, D. C. S. D. N. Y., 7 F. R. D. 208, per Caffey, J.; *Ryan v. Arabian Am. Oil Co.*, D. C. S. D. N. Y., 18 F. R. D. 206, 208, per Bondy, J.; and other earlier cases cited by Judge Smith.

defines of what these court costs shall consist.⁵ As Judge SMITH demonstrates, the decision represents an erroneous reading of the 1949 proviso to 28 U. S. C. §1821 and its legislative history.⁶ The result reached below, D. C. S. D. N. Y., 31 F. R. D. 191, 197, of \$831.60—a not insubstantial sum in itself—is thus based upon strong precedent and long continued, substantially unbroken custom. It is fair and just. It should have been sustained here.

WATERMAN, Circuit Judge (in separate statement):

I dissent from the result reached by the majority of the court and agree with my brothers Clark, Smith and Hays that the judgment for costs of \$831.60 should be affirmed.

I hold a somewhat different view from my colleagues and therefore submit this separate statement. It is my belief that Judge Weinfeld properly treated the motion before him as a motion addressed to his discretion and that he properly exercised his discretion in his disposition of that

⁵ Thus F. R. 54(d) does not define costs, but leaves their fixing to statute or decisional law. And 28 U. S. C. §1920 defines certain costs such as the fees of the clerk and marshal, but is pointedly unspecific in its subd. (3) covering "Fees and disbursements for printing and witnesses."

⁶ This proviso, 63 Stat. 65, to the standard mileage allowance statute, 28 U. S. C. §1821, allowing actual travel expenses to witnesses "attending in any court of the United States . . . who are required to travel between the Territories and possessions, or to and from the continental United States," was obviously passed with no intent to change the long standing federal practice, as Judge Smith demonstrates. Moreover, its wording does not bear the burden attempted to be put upon it, for by its terms it covers travel only between the place of trial and the places listed in the statute which do not include foreign countries. And the comment from the Assistant to the Attorney General adds nothing; the reference to "over-seas travel" is to travel to or from the Territories and possessions. The only case on the proviso, *Knox v. Anderson*, D. C. Hawaii, 163 F. Supp. 822, involving travel between California and Hawaii (i.e., within its exact terms) expressed some reluctance to construing it as without the usual federal rule.

motion. I differ from the position taken in the opinions of the dissenters relative to the power Judge Weinfeld could exercise over the major items of dispute between the parties—the items relating to the proper taxation of transportation expenses of certain of the prevailing party's witnesses who were not subpoenaed. See Judge Weinfeld's discussion at 31 F. R. D. 191, 195-196.

When a motion to review the taxation of witness costs is presented to a district judge he surely should have in mind the rule my three dissenting brothers would inflexibly apply—the rule that recoverable witness mileage should be limited as of course to travel within the district, or, in the event of travel outside the district, to 100 miles of the place of hearing. Nevertheless, such a motion is a proper one to make, and the only purpose of the motion is to have the judge's independent judgment exercised. It is obvious that Judge Weinfeld did have this long-standing rule in mind when he so properly held that the costs movant requested should not be allowed.

I would lay down a rule that, in the taxation of costs "as of course to the prevailing party" by the clerks of our district courts, the so-called "one hundred mile rule" must be followed in the first instance, but I would not take away from a district judge the power to modify that taxation if motion be made to the judge so to do. There is always the rare case—which neither Judge Weinfeld nor I would find this case to be—where taxation inflexibility can work scandalous injustice.

APPENDIX B.

Judgment.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of November, one thousand nine hundred and sixty-three.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. CHARLES F. CLARK,
HON. STERRY R. WATERMAN,
HON. ELONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL.

Circuit Judges.

HOWARD FARMER,
Plaintiff-Appellant,

v.

ARABIAN AMERICAN OIL COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court as to the determination of costs incurred in the trial before Hon. Edward Weinfeld, U. S. D. J., be and it hereby is affirmed but as to the costs taxed by Hon. Edmund L. Palmieri in the first trial, said order be and it hereby is reversed and that the action be and it hereby is remanded with instructions to tax costs in accordance with the opinion of this court with costs to the defendant-appellant.

A. DANIEL FUSARO,
Clerk.

APPENDIX C.**Statutory Provisions.**

28 U. S. C. A. § 1821

CHAPTER 119—EVIDENCE; WITNESSES**§ 1821. Per Diem and mileage generally; subsistence**

A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive \$4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residence as to prohibit return thereto from day to day shall be entitled to an additional allowance of \$8 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided*, That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of \$1 per day. As amended Oct. 31 1951, c. 655, § 51(a), 65 Stat. 727; Sept. 3, 1954, c. 1263, § 45, 68 Stat. 1242; Aug. 1, 1956, c. 826, 70 Stat. 798.

RULE 54(d) FEDERAL RULES OF CIVIL PROCEDURE

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

28 U. S. C. A. § 1920**§ 1920. Taxation of costs**

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.